## G.—Hunting and Fishing.

I may allude to the subject here, though the Act does not take any direct notice of such rights[3].

In fact the circumstances of the country are not such that any legal rights have become fixed as they have in Europe. People, no doubt, have always in former days, gone about the jungle very much as they pleased, and hunted and fished: but the practice is not one which was habitually and necessarily exercised by certain villages in certain localities, like the grazing of cattle or the cutting of firewood. Hence no *right* is provided for or recognized.

It is quite sufficient, in our present stage, to leave the local Government to make such rules as may be necessary to regulate the matter, and infringements of the rules become punishable offences; (Indian Act, sections 25 (*i*) and 31 (*j*); Burma Act, sections 25 (*d*) and 37 (*f*).

These rules are usually framed so as to prevent trespass either generally in certain forests, or at certain seasons for fear of fire, or in certain portions of forests where plantations, seedling growth, &c., are in progress. Opportunity is usually taken also to protect the game itself, by close seasons, prohibiting driving in the snow, &c. Under these circumstances, it would serve no useful purpose to allude to the Continental and English laws[4].

## H.—Temporary or Shifting Cultivation.

### § 37.—*The practice described.*

This practice will probably be well known to my readers. The

[3] The definition of forest produce includes tusks, horns and skins; but this is perhaps to provide for a case (if any) where the shed horns and tusks of animals are collected when found lying about in the forest. I never heard of a right to collect skins, horns, or tusks from living animals, for that, of course, would be a right to "hunting," but would, at the same time, be admissible to be claimed and settled as a right to 'forest produce' also.

[4] Where the subject, of course, is under special and detailed provisions. The edition of the Forest Code of France, which most foresters use, contains also the Code de la Chasse, Code de Louveterie (regarding wolf-hunting and noxious animals) and Code de Pêche fluviale.

For the German laws (Jagdpolizei Gesetzen), the reader will find a brief but excellent account in Eding. (Eding, 8th Abschnitt, p. 204.)

main question is, for a Manual of this kind, ought it to be admitted as a *right* at all?

The Burma law has, indeed, solved the question completely, and in that province, with its valuable and extensive teak-bearing forests, the question was one of the first importance; but in other provinces, the matter must still be dependent on reasoning derived from analogy and from general principles, although the decision of the Bombay High Court in the Kanára case has thrown some light on the subject.

Let me first describe the practice briefly. The following passage extracted from a note by Mr. Brandis, Inspector General of Forests, well describes it. The note relates to Burma; but making allowance for local differences as regards the season of cutting and burning, the size of the clearing, and the length of the period which elapses before the same spot is resorted to and cleared a second time, the extract sufficiently describes the practice as it exists in different parts of India:—

"In January or February, each head of a household cuts down the forest over an area of from 3 to 5 acres, burns the timber, bamboos, and brushwood when dry, sows the paddy in the ashes, and reaps it in autumn. In the following year he cuts down another plot of forest and treats it in the same manner. Dense masses of grass, herbs, bamboos, and coppice-shoots grow up on the plots which he has abandoned, and after a period, which ordinarily varies from 15 to 30 years, the forest has grown up sufficiently to be fit to be cut over a second time.

"This mode of cultivation is not peculiar to Burma: it is practised under the name of 'júm' in Bengal and Assam, is known as 'khíl' and 'koráli' in the North-West Himalaya, as 'bewar'[5] in the Central Provinces, and as 'kumri' [ppnakad, takkal,] &c., in South India. It is, or was formerly, practised in several countries of Europe. As an instance, I may mention the hills of Styria, where it is known under the name of '*Brandwirthschaft*.' On these hills the forest is cut, the large timber is sold, and the tops, branches, and the small stuff are spread over the ground and burnt. The ground is hoed, and oats

[5] The term dahyá is commonly used also; but I am told that it expresses a different method of cultivation in which the plough is used. In Bengal "júm" is said to be rather an official than a vernacular term, each locality has its own name.

or rye are sown. Generally one crop only is taken; but sometimes rye is sown the first, and oats the second, year, after which the forest is permitted to grow up again. Under this system of cultivation, the fertilising effect of the ashes produces heavy crops; and as long as the wood was of little value on the hills of Styria, the system was very extensively practised. As, however, the price of wood increased, it was found more profitable to abandon this plan of cultivation, and to let high forest grow up on the ground.

"On the hills of the Pegu Yoma, where the most important teak forests are situated, the Karens, who are the chief toungya cutters in that part of the country, do not in all cases return to their old grounds when the forest on them has grown up sufficiently, but they frequently move to an adjoining valley or to another part of the country; though, as a rule, each tribe cuts its toungyas within certain limits, which, however, are wide and undefined. Here the population is scanty, and they have extensive areas to roam over, from which they choose the best places for their toungya clearings. Occasionally, they make plantations of the betel-vine, which climbs up the *Erythrina* tree, or they plant mango and jack trees, or they cultivate a few permanent paddy-fields in the forest, and in such gardens and fields they doubtless must be held to have acquired definite rights of occupancy. But the area of these gardens and fields is insignificant. On the vast forest area in which they cut their toungyas they leave no mark whatever of permanent occupation. There are extensive areas covered with secondary growth of trees and bamboos, which has sprung up on deserted toungyas, and here and there the sites of their former villages can be recognised by the half-burnt house-posts in the midst of dense jungle. But these stretches of secondary forest, which grows up on deserted toungyas, are separated by large areas of forest, which has either never been touched, or which has had time to grow up again into high forest.

"In many cases the Karens return to their old grounds, and in such cases their hamlets ('tays'), though they are shifted from place to place, according to the position of their toungya grounds, remain in one valley, or at least in one district. In other cases they move to greater distances and cut their toungyas in old forests. Sickness, quarrels, a visitation of rats, or an unfavourable omen are generally the causes for a move to more distant regions; but frequently they move without a definite cause, except perhaps a sudden fancy of their "tsokay" or headman. It will be understood that, under these circumstances, there is no trace of village areas; there is no attempt at protecting their toungya ground against fire, and no occupancy rights over definite plots of land, except in those rare cases in which they have permanent gardens or paddy-fields. In many other hill tracts of British Burma, the system of toungya cultivation is similar to that which is practised by the Karens on the hills of the Pegu Yoma."

One of the great troubles consequent on this practice is, that the fire from the clearings is allowed to spread in all directions, and mile after mile of forest is annually burnt. Teak and other valuable trees disappear under the process, and the hills subjected to such a treatment become either wholly barren, or clothed with poor stunted vegetation after a number of years. It is well known in Burma that teak has been virtually exterminated over large areas of country by this practice[6].

§ 38.—*Does it give rise to a right?*

Two questions naturally arise on this subject—

(1) Does the practice give any claim to an occupancy, 'landholder's,' or other proprietary right in the soil?

(2) If not, still, does it give rise to a right of *user*, a right (like a grazing right) to continue to use the Government forests for the purpose of temporary cultivation?

§ 39.—*Right to the Soil—Burma.*

As regards the first question, it must be answered in the negative. In Burma, it is expressly declared by the Land Act (II of 1876), that no such right arises. The ordinary form of proprietary right in Burma is not called by that name, but is spoken of as the right or the status of a "landholder," and this, by section 7, can be acquired by continuous occupation under given conditions for 12 years or more; but it is stated that this does not apply to cases in which section 22 of the Act applies. Now section 21 requires the Chief Commissioner to make rules for the practice of toungya, recognizing that this is a matter which needs practically to be dealt with; but section 22 goes on to say that *no right* arises from such a practice except such as the rules themselves expressly convey. No matter, therefore, that the practice has been carried on for years, perhaps for generations, and that a toungya tax has been paid, no right in the soil is established.

[6] See Kurz's Preliminary Report on the Burma Forest Flora, p. 72.

In parts of Burma (the hills between the Salween and Sittang), there is a curious instance of the complete occupation of land by Karen tribes, who, although they only practise toungya, still do so in a manner which leaves no question of real permanent occupation. The equities of such a case will of course be provided for in due time by the specific grant, or recognition of right pursuant to rules made, so that the law is satisfactory. There is, in short, no theoretical right, but Government can by rule grant one when it is right and proper.

### § 40.—*Other parts of India.*

In other parts of India, although the matter has not been declared by the legislature, the same conclusion must be arrived at. In the Kanára case, where the claim to right in the soil was based (among other things) on the fact of kumri cultivation, and the payment of a Government assessment or tax thereon, it was held that this did not amount to any *permanent adverse occupation of a defined area*, which is necessary to establish a right by prescription in the soil, and that the Government assessment was only a payment in the nature of a toll or tax on forest usages, such as under other laws Government imposes without in the least indicating that any right in the soil is recognized. It is quite unlike the case of regular land-revenue, where Government recognizes the person permitted to engage for the payment of the revenue as the proprietor of the soil[7].

### § 41.—*Right to the practice as a servitude.*

The second question is not so easy to answer.

In Burma, indeed, the Forest Act has supplemented the answer given by the Land Act, and declared that, as regards the further

[7] Kanára case (pp. 512-13), GREEN J. said: "The entry of kumri assessment . . . . . and its payment for a long series of years does not manifest any estate or permanent right in the forests," and again: "even if it should be considered that the plaintiff had established a right to have kumri carried on" (this is the second question which I shall examine presently) "such a right would not involve general ownership in the soil."

question of a right of user arising, there is none. The Act consequently speaks of the *practice* of toungya separately from forest *rights* which it regulates. It, of course, treats *toungya* as a practice which cannot summarily be stopped or harshly dealt with; it allows the Forest Settlement Officer to treat it with all the *practical consideration* that would be extended to a real right; but it saves the Government from the embarrassment that would be certain to arise in the future by creating any theoretical right. For it is quite certain that as forest land gets more limited in extent, and population presses, the areas now available for such cultivation will become largely restricted, and it is then a question how far nature herself will compel some modification of the custom, and how far the tribes will develop some other form of cultivation. It will be ample time to decide what sort of rights should be recognized in order to do justice to the cultivators, when this future, but inevitable, development has occurred.

For the rest of India, the question has still to be authoritatively settled. It has not yet been decided by the legislature, nor definitely settled by judicial decision[8].

The difficulty of the question consists in this, that speaking of the point as one of *legal right*, though the ordinary *criteria* of a legal right are not complied with, still there are equitable considerations, which naturally produce in the mind a sense of something analogous to and even closely approaching a right. And speaking of the point as one of *fair dealing* and *administrative*

[8] Although several passages in the Kanára case lead directly to the inference that the Judges would have answered the question (*as a point of law* and apart from certain *equitable* considerations to be noted presently) in the negative. The point, indeed, was not directly in issue in that case (which was a claim to proprietary right in the forest, soil and all), and throughout it is unfortunate that the case was not argued before the Court by lawyers familiar with forest jurisprudence, and therefore, many important points were not taken. In the passage quoted above (see note 8), Mr. Justice Green puts it hypothetically—"*if* it is considered that a right to have kumri carried on, &c."; but it will be seen that the learned Judge considered the Government would *have a right to stop kumri altogether in forests that were not shown to be private property.*

*policy*, there are cases where such cultivation is not only locally harmless, where it is natural and suitable to the locality, but where its hasty suppression would result in great suffering, and possibly in depriving the forest officer of the services of the only tribes who will undertake forest work and furnish guides and helpers. The material destroyed may be in such abundance, that it has far less value than the crops raised; and even if it has value, its utilization and export may be impossible, while the necessity of food production demands its removal. On the other hand, there are cases where the waste of timber is intolerable[9], where the steep slopes on which this practice is carried on, are at the head-waters of streams, and in other localities where the forester knows it is of the highest importance to maintain forest. Here, for the benefit of a few villages or a limited tribal population, the hills are to be denuded, the soil washed off, streams below to be dried up, and creeks once navigable to be choked with silt[10].

The practical solution of the question is, I venture to think, that adopted in the Burma Act. It is to refuse to create a legal right, which does not, strictly speaking, exist; and at the same time make practical provision for settling claims on equitable grounds, and for

[9] A forest officer informs me that he has been able to estimate the value of timber on a jûm clearing in the Gâro hills, cut and destroyed, at Rs. 2,000 to 4,000. In this case the land does not belong to Government; but this is only an instance of what well may be the case elsewhere, as regards this one question of the value of timber destroyed.

[10] As in parts of the Konkan. And then it is very easy for writers to draw harrowing pictures of the poor hill people prevented from pursuing the 'simple practices of their forefathers' and driven from their sylvan haunts by an army of 'ignorant and unsympathetic forest officers.' The tendency of such pictures, possessing as they do a degree of truth on one side, is only to inflame the official mind with departmental and personal feeling, instead of directing it to the grave and dispassionate study of the question; really giving weight to the facts (if they happen to be locally existent) which would necessitate forest preservation, and thereby affording a strong incitement to resolute effort in the direction which is so necessary in such cases, namely, in the direction of establishing permanent cultivation and founding villages in lieu of shifting hamlets and temporary clearing. So long as the Forest Settlement Officer, or other official, is in an uninformed and biassed state of mind on the question, so long he is sure to overlook both the importance and the feasibility of this remedy.

allowing such cultivation on defined areas and under certain conditions inside the forest or outside, as circumstances require.

The argument against the practice giving rise to a right might be briefly indicated as follows :—In the first place, the 'right' is exercised so extremely 'discontinuously' that it cannot be said to be maintained over any definite ground: there is no fixed 'servient estate' on which the right has been openly, peaceably and as of right enjoyed for a long period of years.

This, however, is a question of degree, for where the population is denser the rotation is shorter, and I have alluded above to the existence of cases in which an actual occupation of the soil must be virtually admitted.

Again, it is true that there can be no such thing as a *right* to a wasteful and destructive user of another's property. There is no "*salvâ re substantiâ*" in the toungya usage. The waste is sometimes frightful: not only is the direct loss of timber and destruction of forest capital most serious, but the indirect mischief caused to the estates lying below, by the ravinement of the hill-sides, by the detritus that comes down, and the silting up of streams and the drying up of springs, is still greater.

On the other hand, this too is a question of degree: the practice may be found in hills where the value of the crops far exceeds (as far as the hill population is concerned) the value of the timber for which, in many places, there may be no local value whatever and no means of export.

### § 42.—*Practical conclusion.*

Under such circumstances then, I submit that no hard-and-fast legal right should be recognized, but the Government should be free to deal with the practice by rules and to recognize practically all the equities of the case, and the time may come when it may be desirable to recognize more formally the growth of actual rights in specific cases. This conclusion derives additional force from the fact that it has been adopted, as regards Burma, by the legislature.

Whenever the practice is really dangerous, Government must exercise its right to stop it. The gentle and persevering efforts of sensible officers will rarely fail to succeed in getting rid of the practice without causing any suffering whatever. It was so extinguished by Sir Mark Cubbon in Mysore; a great measure of success has been attained in the Central Provinces and in Bombay. And always the first step was to make liberal contributions to aid the people in getting seed, ploughs, and cattle, or whatever else is needed to get them to settle down, and terrace the hill-sides into permanent fields, or emigrate into the plains where level cultivation is possible. Where the interest of the whole country and its water-supply is bound up in the preservation of forest, as on the Western Ghâts, resolute and persevering efforts directed to this end will generally be successful.

Where it is not possible or necessary to shut out such cultivation altogether, it is essential that defined blocks should be permanently assigned in the forest area, and effort has to be directed to fire-tracing these blocks, so as to get the people to prevent the fire from their clearings spreading to the adjacent forest. That this is possible is amply proved by the practice of the people in the hills between the Sittang and Salween rivers in Burma, to which I have already alluded.